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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUN 02 2006
SRC 05 055 51952

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Acting Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a church. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a religious kindergarten teacher. The director determined that the petitioner had not established that it is a bona fide nonprofit religious organization, that the position qualifies as that of a religious worker, that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition, or that it has the ability to pay the proffered wage.

On appeal, counsel submits a letter and additional documentation.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before October 1, 2008, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before October 1, 2008, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The first issue presented on appeal is whether the petitioner established that it is a bona fide nonprofit religious organization.

The regulation at 8 C.F.R. § 204.5(m)(3)(i) states, in pertinent part:

(3) *Initial evidence.* Unless otherwise specified, each petition for a religious worker must be accompanied by:

(i) Evidence that the organization qualifies as a nonprofit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations (in appropriate cases, evidence of the organization's assets and methods of operation and the organization's papers of incorporation under applicable state law may be requested); or

(B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organization.

To meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(A), a copy of a letter of recognition of tax exemption issued by the Internal Revenue Service (IRS) is required. In the alternative, to meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(B), a petitioner may submit such documentation as is required by the IRS to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code (IRC) of 1986 as it relates to religious organizations. This documentation includes, at a minimum, a completed IRS Form 1023, the Schedule A supplement, if applicable, and a copy of the organizing instrument of the organization, which contains a proper dissolution clause and which specifies the purposes of the organization.

With the petition, the petitioner submitted a copy of a year 2003 State of Florida Not-for-Profit Corporation Uniform Business Report, a copy of its articles of incorporation containing the dissolution clause required by the IRS when evaluating an organization for tax-exempt status under section 501(c)(3) of the IRC, a copy of its certificate of incorporation, a copy of a Consumer's Certificate of Exemption issued by the State of Florida exempting the petitioner from the payment of state sales and use tax, and a copy of a January 25, 1966 letter from the IRS to the Wisconsin [REDACTED] granting that organization a group tax-exemption for its subordinate units.

In a request for evidence (RFE) dated April 2, 2005, the director instructed the petitioner to "Submit a letter from the parent organization showing you as part of their organization under their IRS's 501(c)(3) certification." In response, the petitioner resubmitted the documentation submitted with the petition.

The petitioner must either provide verification of individual exemption from the IRS, proof of coverage under a group exemption granted by the IRS to the denomination, or, pursuant to 8 C.F.R. § 204.5(m)(3)(i)(B), by submitting such documentation as is required by the IRS to establish eligibility as a tax-exempt nonprofit religious organization. The organization can establish eligibility under 8 C.F.R. § 204.5(m)(3)(i)(B) by submitting documentation that establishes the religious nature and purpose of the organization, such as brochures or other literature describing the religious purpose and nature of the activities of the organization. The necessary documentation is described in a memorandum from William R. Yates, Associate Director of Operation for CIS, *Extension of the Special Immigrant Religious Worker Program and Clarification of Tax Exempt Status Requirements for Religious Organizations* (December 17, 2003):

- (1) A properly completed IRS Form 1023,
- (2) A properly completed Schedule A supplement, if applicable,

- (3) A copy of the organizing instrument of the organization that contains the appropriate dissolution clause required by the IRS and that specifies the purposes of the organization, and
- (4) Brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.

The above list is consistent with the regulatory requirement at 8 C.F.R. § 204.5(m)(3)(i)(B), cited above. The memorandum specifically states that the above materials are, collectively, the “minimum” documentation that can establish “the religious nature and purpose of the organization.” Thus, for example, a petitioner cannot meet this burden by submitting only its articles of incorporation. Also, obviously, it is not enough merely for the petitioner to *submit* the documents listed above. The *content* of those documents must establish the religious purpose of the organization.

On appeal, the petitioner submitted a copy of an August 24, 2005 letter [REDACTED] a legal assistant for financial services for the [REDACTED] certifying that the petitioner is covered under the group tax-exemption granted to that organization.

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The record before the director includes a copy of the petitioner’s articles of incorporation with a proper dissolution clause and copies of several church programs. The record does not contain a copy of IRS Form 1023 and therefore does not contain sufficient evidence to satisfy alternate means of establishing tax-exempt status pursuant to 8 C.F.R. § 204.5(m)(3)(i)(B).

As the record before the director does not establish that the petitioner was included under the group tax exemption granted to the [REDACTED] and did not contain evidence to establish the petitioner’s eligibility under 8 C.F.R. § 204.5(m)(3)(i)(B), it does not establish that the petitioner is a bona fide nonprofit religious organization.

The second issue on appeal is whether the position qualifies as that of a religious worker.

According to the regulation at 8 C.F.R. § 204.5(m)(1), the alien must be coming to the United States at the request of the religious organization to work as a religious worker. The regulation at 8 C.F.R. § 204.5(m)(2) states, in pertinent part:

Religious occupation means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters.

The proffered position is that of a religious kindergarten teacher. In its letter of November 12, 2004 accompanying the petition, the petitioner stated that the position encompassed the following duties:

Teach elemental, natural, and social science, personal hygiene, music, art, and literature in accordance with the Lutheran curriculum to children from 3-5 years old, to promote their physical, mental, and social development: supervise activities, such as field visits, group discussions, and dramatic play acting, to stimulate students interest in and broaden understanding of their physical, social, and religious environment. Fosters cooperative social behavior based on the Lutheran tenets through games and group projects to assist in forming satisfying relationships with other children and adults. Encourage students in singing, dancing, rhythmic activities, and in use of art materials, to promote self-expression and appreciation of esthetic experience . . . Discuss students problems and progress with parents. Provide religious guidance.

The petitioner indicated that the beneficiary would use the approved Lutheran curriculum for preschool children, and provided "representative pages" from the curriculum. The documentation provided indicates that the curriculum consists of religious-based classes geared for the younger child. In response to the director's RFE, the petitioner submitted additional information regarding the school, including copies of newsletters that indicate the scripture and bible story for the coming week.

The duties of the position as documented by the petitioner are not inconsistent with those of a religious instructor. The evidence, therefore, sufficiently establishes that the position is a religious worker within the meaning of the statute and regulation.

The third issue on appeal is whether the petitioner established that the beneficiary had been continuously employed in a qualifying religious vocation or occupation for two full years prior to the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m)(1) states, in pertinent part, that "[a]n alien, or any person in behalf of the alien, may file a Form I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States." The regulation indicates that the "religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition."

The regulation at 8 C.F.R. § 204.5(m)(3) states, in pertinent part, that each petition for a religious worker must be accompanied by:

(ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:

(A) That, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work.

The petition was filed on December 20, 2004. Therefore, the petitioner must establish that the beneficiary was continuously working as a religious kindergarten teacher throughout the two-year period immediately preceding that date.

In its November 12, 2004 letter, the petitioner stated that the beneficiary had 11 years of experience teaching children at a Christian school in India. In his letter of October 10, 2004, [REDACTED] stated that prior to her association with the petitioner, the beneficiary was a teacher at the [REDACTED] in India for “the last two years.” The petitioner submitted no evidence to document the beneficiary’s work during the qualifying period. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In her RFE, the director instructed the petitioner to:

Submit a detailed description of the beneficiary’s prior work experience including duties, hours and compensations . . . accompanied by appropriate evidence (such as original pay stubs or cancelled checks, earning statements, W-2’s or other probative evidence). Submit an IRS certified copy of the income tax returns with all the pertaining W-2s for the two years preceding the filing of this petition. All evidence should be submitted for the time frames of December 20, 2002 up to December 20, 2004.

In his letter forwarding the petitioner’s response to the RFE, counsel stated that the beneficiary was not approved to work in the United States until March 3, 2004, and that prior to entering the United States, she worked for the [REDACTED] in India. The petitioner submitted an undated statement from [REDACTED] who stated that the beneficiary worked 30 hours per week as a teacher for the [REDACTED] from April 2001 to October 2003. The petitioner also submitted copies of “attendance sheets” from [REDACTED] Church for September and October 2003, indicating that the beneficiary worked six hours per day and five days per week. The petitioner submitted no evidence of compensation received by the beneficiary during the period that she worked for the [REDACTED] in India and no evidence of how the beneficiary maintained herself financially during this time frame.

The petitioner also submitted copies of “time sheets” for its preschool, reflecting that the beneficiary worked approximately 40 hours per week beginning March 22, 2004. The petitioner submitted a copy of the beneficiary’s Form W-2, Wage and Tax Statement, and a copy of her Form 1040EZ, Income Tax Return for Single and Joint Filers With No Dependents, for 2004. The tax documents reflect that the petitioner paid the beneficiary \$8,085 in wages for the year.

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of “a number of safeguards . . . to prevent abuse.” See H.R. Rep. No. 101-723, at 75 (1990).

The statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for

a religious organization was required to be engaged “principally” in such duties. “Principally” was defined as more than 50 percent of the person’s working time. Under prior law a minister of religion was required to demonstrate that he/she had been “continuously” carrying on the vocation of minister for the two years immediately preceding the time of application. The term “continuously” was interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

The term “continuously” also is discussed in a 1980 decision where the Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

On appeal, the petitioner submits a September 30, 2005 letter from the [REDACTED] stating that the beneficiary “was on paid leave from November, 2003 to February, 2004,” and that until her employment in the United States, she was “considered fully employed by our church.” A letter signed by the treasurer and secretary of the church indicated that the beneficiary’s salary was 3,500 rupees per month. The petitioner also submits copies of the beneficiary’s “attendance sheets” for the period January August 2003, reflecting that she worked 30 hours per week.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. at 764; *see also Matter of Obaigbena*, 19 I&N Dec. at 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The petitioner did not provide evidence to the director of the beneficiary’s employment during 2002 or for the majority of 2003. Further, the church in India initially indicated that the beneficiary worked through October 2003, yet on appeal it alleges that she was on paid leave for four months. Although the petitioner submitted a salary statement for the beneficiary from the [REDACTED] it submitted no documentary evidence such as canceled paychecks or pay vouchers, particularly during the period of “paid leave.”

The record before the director does not establish that the beneficiary worked continuously throughout the two-year period immediately preceding the filing of the visa petition.

The fourth issued on appeal is whether the petitioner not established that it had the ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner does not indicate the amount of the proffered wage. In his letter accompanying the RFE, counsel stated that the beneficiary received \$7.25 per hour, and that the petitioner “is providing housing with members of the congregation. The host family provides the food.” However, no evidence in the record supports counsel’s statements. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As evidence of its ability to pay the beneficiary, the petitioner submitted a copy of a “customer relationship profile” that does not reflect the financial institution that issued the letter, a copy of its 2004-2005 budget, and copies of Forms 941, Employer’s Quarterly Federal Tax Return, for 2002 through the first quarter of 2005 for its preschool.

The above-cited regulation states that evidence of ability to pay “shall be” in the form of tax returns, audited financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only in addition to, rather than in place of, the types of documentation required by the regulation. In this instance, the petitioner has not submitted any of the required types of primary evidence.

On appeal, the petitioner submits a copy of its 2005-2006 budget. Counsel states on appeal that the evidence establishes that the petitioner has substantial cash resources, and that the evidence establishes conclusively that the petitioner has the ability to pay the beneficiary the proffered wage.

We note that the petitioner submitted evidence that it paid the beneficiary \$8,085 in 2004. However, as the petitioner did not state the amount of the proffered wage, the AAO cannot determine from the evidence that the petitioner has paid the beneficiary at least the amount of the proffered wage in the past.

Accordingly, as the petitioner has not submitted any of the primary types of evidence and has not identified a specific salary that it will pay the beneficiary, or that it has paid the beneficiary this wage prior to the filing of the visa petition, it has not established that it has the ability to pay the proffered wage.

Beyond the decision of the director, the petitioner has not established that it has extended a qualifying job offer to the beneficiary.

The regulation at 8 C.F.R. § 204.5(m)(4) states, in pertinent part, that:

Job offer. The letter from the authorized official of the religious organization in the United States must state how the alien will be solely carrying on the vocation of a minister, or how the alien will be paid or remunerated if the alien will work in a professional capacity or in other

religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or the solicitation of funds for support.

The petitioner did not indicate the terms and conditions of the beneficiary's proposed employment. As discussed above, counsel asserts that the petitioner will pay the beneficiary \$7.25 per hour and that she will work 40 hours per week; however, no evidence of record corroborates counsel's statement. *See Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. As the petitioner has not indicated the terms of the beneficiary's proposed employment, it has not established that it has extended a qualifying job offer to the beneficiary. This deficiency constitutes an additional ground for which the petition may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.